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January 6, 2005

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Office of Managing Director
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, DC 20554

Attn: Wireline Competition Bureau

Re: Smith Bagley, Inc.
Petition for Designation as an Eligible Telecommunications
Carrier for the Navajo Reservation in Utah
CC Docket No. 96-45

Dear Madam Secretary:

Smith Bagley, Inc. ("SBI"), by counsel, supplements the above-captioned petition for ETC status on Navajo reservation lands in Utah ("Petition"). SBI provides this supplement in response to a request from the Commission for additional information and documentation in support of its Petition.

Consent to Jurisdiction

The Navajo Nation Codes, Title 21, Chapter 5, authorizes the Navajo Nation Telecommunications Regulatory Commission ("NNTRC") to regulate telecommunications services provided on the Navajo Nation. The NNTRC's statutory authority includes numerous provisions for regulating the rates, entry, service quality, and rights of way.

SBI has consented to the jurisdiction of the NNTRC for its operations on Navajo reservation land in Utah. A copy of SBI's letter to the Commission confirming its consent is attached hereto as Exhibit A.

Navajo Population

Over the past several weeks, SBI has obtained data from the Utah Navajo Trust Fund (“UNTF”), a nonprofit organization that tracks the Utah Navajo population on a more granular level than the U.S. Census. According to UNTF data, as of 2004, the Navajo Nation in Utah contains approximately 8,093 citizens. Of those, approximately 7,806, or 96%, are Navajo tribal members. According to the UNTF, the population figure is significantly higher than the 2000 U.S. Census figures for Utah because the Census typically undercounts Native American population in rural areas by a significant margin. In addition, population growth on reservation lands is higher than most other parts of the country.

In the *Pine Ridge* case, ETC designation was conferred on the petitioner for its service to tribal members living on the reservation.¹ While the Commission may wish to follow *Pine Ridge*, the circumstances here are different and may warrant a different result. Specifically, SBI has placed into the record evidence that household telephone penetration rates throughout Navajo reservation lands are abysmally low. SBI urges the Commission to look carefully at the circumstances on Navajo Reservation lands and find that the poverty, unemployment, and telephone penetration levels all warrant designating SBI throughout the Navajo Reservation in Utah for all citizens living within its borders. This result will ensure that high-cost support will be used to serve all residents and that everyone living in this area will be eligible for Lifeline and Link-up benefits.

That said, SBI does not object to designation consistent with that made in the *Pine Ridge* case.

Status of Navajo Lands in Utah

On the Navajo Reservation in Utah, there are three land classifications. The vast majority of land is classified as Reservation Trust Land, which is consistent with the designation throughout the vast majority of Navajo Land in Arizona and New Mexico. There are a few small tracts of private lands and Indian Allotment Lands, which are identified on the map attached hereto as Exhibit B. These areas are negligible, well less than five percent of the area proposed to be designated.

There are no “checkerboard” or other land classifications similar to those present in New Mexico, where allotment, trust, and private lands are interspersed. While SBI prefers a designation that does not discriminate against low-income persons living on private lands, it will not object to designation consistent with that made in the *Pine Ridge* case, limiting designation to Navajo Reservation Trust Land in Utah.

¹ Western Wireless Corporation, Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, FCC 01-284, Memorandum Opinion and Order (2001).

Navajo Preference Employment Act

As mentioned in SBI's supplement filed on July 15, 2003, SBI must give preference to Navajo tribal members when making employment decisions for positions to be filled on Navajo reservation lands. The Navajo Preference in Employment Act ("NPEA") is a comprehensive tribal employment act. It requires employers doing business within the Navajo Nation or near its boundaries to "[g]ive preference in employment to Navajos." SBI is required to submit a written Navajo affirmative action plan, to create and post of a Navajo employment preference policy, and to establish a "just cause" termination standard for Navajo employees. The NPEA is relatively detailed and its interpretation is informed by court decisions.

SBI complies with NPEA and in so doing employs a number of Navajo tribal members in its operations. Moreover, if this petition is granted, expansion of SBI's service in Utah will open additional employment opportunities for Navajo tribal members. SBI expects to hire additional Navajo employees in connection with its operations on Navajo lands in Utah. SBI's service expansion will also lead to employment opportunities for others in related industries, as well as open additional business opportunities as economic development takes hold in areas that are currently unserved or underserved with wireless telecommunications.

Tribal Sovereignty

The ability to regulate SBI's activities in Utah is important to the sovereignty of the Navajo Nation. In setting forth the purposes and intent of the NNTRC, Chapter 5 of Title 21 of the Navajo Nation Code ("Navajo Code"), Section 502, states:

[T]he Navajo Nation by virtue of its inherent sovereign powers has the authority to assert jurisdiction over telecommunications not preempted by applicable law and regulation of the federal government of the United States....Federal laws now in force regulating telecommunications activity which do not preempt the Navajo Nation's jurisdiction to regulate telecommunications shall have the same force and effect and shall be binding and obligatory upon the Navajo Nation to the extent that said laws benefit and protect the culture and desires of the Navajo People and are not otherwise inconsistent with the provisions of this Code.

Except where preempted by federal law, the Navajo Code empowers the NNTRC to regulate, for example, rates, entry, service quality, complaint procedures, and rights of way for persons doing business within the Navajo Nation.

Pursuant to Section 508 of the Navajo Code, entitled "Cooperation with other Jurisdictions," the NNTRC is empowered as follows:

Where the extent of telecommunications regulatory jurisdiction of the Navajo Nation and the states, and their subdivisions and agencies are not clearly defined or involve potential jurisdictional conflict, including, without limitation, potential

jurisdictional conflict arising from the Commission's transition to a fully operational telecommunications regulatory body for the Navajo Nation, the Commission is authorized as the designated representative of the Navajo Nation to negotiate and develop for approval by the Intergovernmental Relations Committee of the Navajo Nation Council appropriate intergovernmental agreements or joint powers agreements as are necessary to resolve such jurisdictional issues, and is further authorized to represent or intervene on behalf of the Navajo Nation in proceedings before the states and their subdivisions and agencies.

The specific delegations of authority to the NNTRC give it sweeping powers to regulate rates, entry, service quality, and rights of way where such regulation is not preempted by federal law. SBI's service will be governed by Navajo law. Disputes over service provided or arising under SBI's service agreement will be resolved under Navajo law in a tribal forum, enforceable in a tribal court.

The tribe's sovereign interest in regulating telephone services provided on the Navajo Reservation outweigh the state's interest in regulating telecommunications in Utah. To date, the Utah Public Service Commission has not claimed any of the harms asserted by the South Dakota commission in *Pine Ridge*. The state does regulate the rates, entry, and many other aspects of the ILEC operations on Navajo lands. It does not have a comprehensive regulatory structure set up for CMRS carriers.

Any concern about dual regulatory structures on Navajo lands in Utah is limited to a discrete geographic area within the state. Indeed, since the NNTRC will govern all carriers on Navajo lands irrespective whether they are ETCs, the dual regulatory structure will not change as a result of the FCC's action here. As a practical matter, it is not unreasonable for all telecommunications carriers operating in Utah to understand that operating on Navajo Reservation land, where roughly 96% of the people are tribal members, will involve a different regulatory structure.

The tribe's sovereign interests are also served by FCC designation because the Navajo Nation is able to provide for its citizens in dealings with telecommunications service providers more effectively than the state. The poverty level on Navajo lands is extreme. Navajo people below the poverty line are far less likely to complain to the Utah Public Service Commission, located in Salt Lake City, than they are to seek redress within the tribe, through local chapter houses and community leaders. The tribe has a critical sovereign interest in providing a readily accessible forum for its members to resolve issues with telecommunications carriers.

SBI believes that the ILEC serving Navajo lands in Utah has not consented to the tribe's jurisdiction and would not be subject to Navajo jurisdiction, since it is a carrier certificated by the state. The state has continuing jurisdiction over ILECs for the purposes of regulating for example, carrier rates, services and carrier of last resort obligations, while the Navajo have

jurisdiction over competitive carriers for purposes of providing a second service on Navajo lands.

In regulating competitive carriers who are not certificated by the state of Utah, the Navajo Nation has a strong interest in protecting its rights of way, natural resources, view shed and historic landmarks affected by wireless telecommunications infrastructure. The tribe also has an interest in ensuring that the particular needs of its people for basic and advanced telecommunications services are met. Through its oversight of carriers operating on tribal lands, the NNTRC will be able to encourage development of modern infrastructure and services.

The NNTRC also has a strong interest in protecting the health, safety and welfare of its citizens by ensuring that all carriers have a fair opportunity to provide service to its citizens and that sufficient facilities are deployed so as to provide service through the areas where people live, work and play. Wireless service is now considered to be a critical component of our nation's health and safety, from homeland security down to the most basic of personal needs. This is especially true on Navajo lands because many tribal members are nomadic or seasonal workers who move often and are better served by mobile wireless communications. In terms of safety, whether it be fire, natural disasters, or weather, displaced citizens rely on wireless service to communicate. For every tower SBI constructs on reservation lands in Utah, citizens will be better able to take advantage of the health and safety benefits that wireless can provide.

All of these factors are important in affirming the tribe's sovereign interest in regulating the relationship between SBI and Navajo tribal members in Utah. The tribe's ability to regulate telecommunications services directly affects the welfare of Navajo tribal members. This is especially true where, although an ILEC is authorized to serve throughout the area, consumers as a practical matter have only one choice, or sometimes no choice, in telephone service providers. SBI expects that its construction of telecommunications facilities in substantial portions of the proposed ETC service area will represent the first significant wireless telecommunications investment in these areas and will provide consumers with their primary means of connecting to the telephone network.

When the Commission granted ETC status to Western Wireless on the Pine Ridge Reservation, it did so over the objection of the South Dakota Public Utility Commission, which asserted its right to regulate competitive carriers operating on reservation lands.² Here, the Utah Public Service Commission has not requested authority to regulate SBI's operations on Navajo Reservation Lands. Accordingly, SBI does not believe the FCC has the same jurisdictional concerns that were present in South Dakota.

Conclusion

Telephone penetration on Navajo lands in Utah is abysmally low and has not been materially improved in the four years since the FCC approved Tier 4 Lifeline support for tribal

² Id.

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lands. There are no fewer than seven other wireless carriers authorized to serve Navajo lands, none of which have provided any substantial service on Navajo lands in Utah, much less applied for ETC status.

SBI is willing to make significant investments on reservation lands, primarily because this geographic area is its home. SBI is not distracted by larger markets and does not operate its service area as an extension of a metropolitan network. There are less than 2000 households, spread across the Navajo Reservation in Utah and SBI is willing to extend service to every requesting customer to the best of its ability.

For all of the above reasons, SBI urges prompt action on its petition.

Sincerely,

A handwritten signature in black ink, appearing to read "David LaFuria".

David LaFuria
Counsel for Smith Bagley, Inc.

Enclosures

cc: Narda Jones, Esq.
Anita Cheng, Esq.
Shannon Lipp, Esq.